MAY 29 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

MOTION OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED AND BRIEF OF SAID APPELLEES IN SUPPORT THEREOF

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

JUDITH MEARS
22 East 40th Street
New York City, New York
(212) 725-1222

Attorneys for Appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D.

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Motion of Appellees to Affirm the Judgment Sought to Be Reviewed 1

Brief of Appellees in Support of Their "Motion to Affirm the Judgment Sought to Be Reviewed" 4

Introduction 4

Argument 5

Point I—The District Court Acted Properly and Correctly in Deciding the Constitutionality of Section 6(1) of the Challenged Legislation and the Doctrine of Abstention Was Inapplicable to the Situation Before the District Court 5

Point II—The District Court Correctly and Properly Held Section 6(1) to Be Constitutionally Overbroad 6

Point III—The District Court Correctly and Properly Held the Entire Section 6(1) to Be Unconstitutional and the Various Sentences Thereof to Be Not Severable 10

Conclusion 12

TABLE OF CITATIONS

Cases

The California Bankers Association v. Schultz, *etc., et al.*, 416 U.S. 21 (1974) 7

Coe, *et al.* v. Gerstein, *etc., et al.*, 376 F.Supp. 695 (S.D. Fla. 1973) 7

Doe, *et al.* v. Bolton, *et al.*, 410 U.S. 179 (1973) 2, 7
Doe v. Rampton, *et al.*, 366 F.Supp. 189 (D.Utah 1973) .. 7, 8

Harrison, *et al.* v. National Association for the Advancement of Colored People, *et al.*, 360 U.S. 167 (1959) .. 6

Hodgson, *et al.* v. Anderson, *etc.*, *et al.*, 378 F.Supp. 1008 (D.Minn. 1974) 7

Kusper, *et al.* v. Pontikes, 414 U.S. 51 (1973) 6

Planned Parenthood Association, Inc., *et al.* v. Fitzpatrick, *et al.* (E.D.Pa., No. 74-2440, filed and temporary injunction issued Sept. 20, 1974), *application for vacation of preliminary injunction denied, sub nom.* Wohlgemuth, *et al.* v. Planned Parenthood of Southeastern Pennsylvania, Inc., *et al.*, 42 L.Ed.2d 797 (No. A-285, Jan. 13, 1975) 9

Rodgers, *et al.* v. Danforth, *et al.*, 410 U.S. 949 (1973) .. 6
Roe, *et al.* v. Wade, 410 U.S. 113 (1973) 2, 7

State *ex rel.* State Board of Mediation v. Pigg, 244 S.W. 2d 75 (Mo. 1951) 11

Word, *et al.* v. Poelker, *et al.*, 495 F.2d 1349 (8th Cir. 1974) 6, 7

Zwickler v. Koota, 389 U.S. 241 (1967) 6

Statutes

Minnesota Statutes, Section 145.412, Subdivision 3(3) (1974) 8

Missouri Revised Statutes, Section 559.010 10

Missouri Revised Statutes, Section 559.020 10

Missouri Revised Statutes, Section 559.030 10

Missouri Revised Statutes, Section 559.070 10

Missouri Revised Statutes, Section 559.090 10

Missouri Revised Statutes, Section 559.140 10

Utah Statutes, Annotated, Section 76-7-309 8

Utah Statutes, Annotated, Section 76-7-310 8

Articles

16 *American Jurisprudence 2d*, "Constitutional Law," Section 186, pp. 414-415 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the
Eastern District of Missouri, Eastern Division

MOTION OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Come now said appellees and pursuant to Rule No. 16(1)(c) of the United States Supreme Court move this Honorable Court to affirm the "Order, Judgment and Decree" of January 31, 1975, and to affirm the "Order" of February 12, 1975, both

as unanimously rendered by the United States District Court for the Eastern District of Missouri, Eastern Division, in Cause No. 74-416(C)(A), encaptioned *Planned Parenthood of Central Missouri*, et al. v. *Danforth*, etc., et al., The Honorable William H. Webster, United States Circuit Judge, The Honorable Roy W. Harper, United States Senior District Judge, and The Honorable H. Kenneth Wangelin, United States District Judge, presiding, in and only so far as said "Order, Judgment and Decree" and said "Order" declare unconstitutional Section 6(1) of "House Committee Substitute for House Bill No. 1211", enacted into law and effective in the State of Missouri on June 14, 1974.

Said appellees so move to affirm on the ground that it is manifest that the questions raised by appellant Danforth and on which the decision of this cause depends, are so unsubstantial as neither to need nor to warrant further argument and judicial review by this Honorable Court.

Said appellees further so move to affirm on the ground that for this Honorable Court to note probable jurisdiction or to postpone consideration of the question of jurisdiction would only seek to encourage the passage of legislation which flies in the face of this Honorable Court's decisions in *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973) and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973) and which on each and every occasion challenged have been declared unconstitutional or have been stayed on appeal. The listing of all such cases to date is too numerous to cite herein.

WHEREFORE, said appellees pray this Honorable Court to affirm said "Order, Judgment and Decree" and said "Order", as they apply to said Section 6(1), herein appealed.

Respectfully submitted

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER
& RIMMEL
7733 Forsyth Boulevard
Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

JUDITH MEARS
22 East 40th Street
New York City, New York
(212) 725-1222

Attorneys for Appellees, Planned
Parenthood of Central Missouri,
David Hall, M.D., and
Michael Freiman, M.D.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1419

JOHN C. DANFORTH, Attorney General
of the State of Missouri,
Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri,
Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF OF APPELLEES, PLANNED PARENTHOOD OF CENTRAL MISSOURI, DAVID HALL, M.D., AND MICHAEL FREIMAN, M.D., IN SUPPORT OF THEIR MOTION TO AFFIRM THE JUDGMENT SOUGHT TO BE REVIEWED

Introduction

Appellees, for the sake of brevity and the avoidance of unnecessary repetition, adopt by reference the sections of appel-

lant Danforth's *Jurisdictional Statement* entitled "Jurisdictional Statement" (Jur.St. p. 1), "Citation to Opinion Below" (Jur. St. p. 2), "Jurisdiction" (Jur.St. pp. 2-4) and "Appendix" (Jur. St. pp. 13-52). Nevertheless, appellees do feel compelled to note to this Honorable Court the conspicuous failure of appellant Danforth to recite this Honorable Court's granting of a stay and injunction as to all portions of the challenged legislation held constitutional by the District Court. (43 L.Ed.2d 389, No. A-656, Feb. 18, 1975).

Appellees shall respond to the "Questions Presented" (Jur. St. p. 4) as posed by appellant Danforth and shall demonstrate their unsubstantial nature, thus obviating the necessity and the desirability for further argument of the same before this Honorable Court.

I

The District Court Acted Properly and Correctly in Deciding the Constitutionality of Section 6(1) of the Challenged Legislation and the Doctrine of Abstention Was Inapplicable to the Situation Before the District Court

The doctrine of abstention has been defined and explained by this Honorable Court as follows,

> "The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question. * * * Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication. Harman v. Forssenius, 380 US 528, 534, 14 L Ed 2d 50, 85 S Ct 1177. But the doctrine of abstention 'contemplates that deference to state court adjudication only be made where the issue of

> state law is uncertain.' Ibid. Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect every right granted or secured by the Constitution of the United States.' Robb v. Connolly, 111 US 624, 637, 28 L Ed 542, 4 S Ct. 544." (*Kusper*, et al. v. *Pontikes*, 414 U.S. 51, 54-55 [1973]).

(See, also, *Zwickler* v. *Koota*, 389 U.S. 241, 248-249 [1967] and *Harrison*, et al. v. *National Association for the Advancement of Colored People*, et al., 360 U.S. 167, 176-178 [1959]).

Of the five federal court cases involving the interpretation of restrictive abortion legislation and regulation in Missouri, the Federal District Court has abstained on two prior occasions and was each time reversed. (*Rodgers* et al. v. *Danforth*, et al., 410 U.S. 949 [1973], and *Word*, et al. v. *Poelker*, et al., 495 F.2d 1349 [8th Cir. 1974]).

Abstention under the present circumstances is highly unwarranted, particularly when it is sought to be applied on a selective basis to only one section among a total of nine sections challenged. Furthermore, as will become evidence *infra*, the challenged wording is clearly not susceptible to an interpretation that would avoid constitutional infirmities. The District Court panel of three federal judges unanimously agreed on the patent meaning and intent of such Section 6(1).

II

The District Court Correctly and Properly Held Section 6(1) to Be Constitutionally Overbroad

It cannot be reasonably argued that the first sentence of Section 6(1) is intended only to apply post-natally. The use of the

word "fetus" in the first sentence and the use of the word "child" in the second and third sentences clearly intended to differentiate the time period involved. The failure of the challenged section to exclude from its coverage the early portions of pregnancy conflicts with the teachings of this Honorable Court in *Roe*, et al. v. *Wade*, 410 U.S. 113 (1973), and *Doe*, et al. v. *Bolton*, et al., 410 U.S. 179 (1973).

As this Honorable Court has stated,

> "Where fundamental personal rights are involved—as is true when as here the Government gets large access to one's beliefs, ideas, politics, religion, cultural concerns, and the like—the Act should be 'narrowly drawn' . . . to meet the precise evil." (*The California Bankers Association* v. *Schultz*, etc., et al., 416 U.S. 21, 85-86 [1974]). (See, also, *Roe*, *supra*, at p. 155).

The language of Section 6(1) literally runs counter to the entire remainder of the statute challenged herein and to the explicit directives of *Roe*, *supra*, and *Doe*, *supra*. It is impossible to abort a fetus while exercising the same "skill, care and diligence" used "to preserve the life and health of any fetus intended to be born". This vague, ill-defined and self-contradictory clause has a present and continuing "chilling effect" upon appellees and other similarly situated. Its meaning applies across the board to all stages of pregnancy and for this reason alone, among others, it is constitutionally defective. (For failure of regulation to distinguish between stages of pregnancy, see *Doe* v. *Rampton*, et al., *infra*, *Coe*, et al. v. *Gerstein*, etc., et al., 376 F.Supp. 695 [S.D.Fla. 1973], and *Word*, et al.v. *Poelker*, etc., et al., 495 F.2d 1349 [8th Cir. 1974]).

In *Hodgson*, et al. v. *Anderson*, etc., et al., 378 F.Supp. 1008 (D. Minn. 1974), the unanimous court held invalid a like clause requiring abortions to be performed when the fetus is "*potentially* viable" "under circumstances which will reasonably assure

the live birth and survival of the fetus" (Section 2, subdivision 3[3] of S.F. 498 [Minn. Stat., Section 145.412, Subd. 3(3) (1974)]).

An unanimous court in *Doe* v. *Rampton*, et al., 366 F.Supp. 189 (D. Utah 1973), voided sections of the law providing,

> "Medical procedure where fetus sufficiently developed.—If an abortion is performed when the fetus is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that procedure which in the medical judgment of the physician will give such fetus the best chance of survival, and no medical procedure designed to kill or injure such fetus may be used." (Utah Stat. Ann., Section 76-7-309).
>
> "Medical skills to preserve life of fetus.—The physician performing any abortion must use all of his medical skills to promote, preserve and maintain the life of any fetus sufficiently developed to have any reasonable possibility of survival outside its mother's womb." Utah Stat. Ann., Section 76-7-310).

The court stated,

> "Sections 76-7-309 and 76-7-310 are invalid because they might apply in any trimester, and because, regardless of the trimester in which they are applied, they unduly interfere with the professional judgment of the doctor involved." (366 F.Supp. at p. 193).

At the trial of the present cause, appellees' witnesses, Dr. Warren (Tr. p. 29), Dr. Thomas Kerenyi (Tr. p. 91), and appellant's only witness personally familiar with the performance of abortions, Dr. Anderson (Tr. p. 345), all testified that it is medically impossible to perform an abortion while si-

multaneously complying with the requirements of this Section 6(1).

A fair and literal reading of this Section reveals the intent that the first sentence which utilizes the word "fetus", repeatedly and exclusively, and which contains no specific punishment reference applies only to the intra-utero period.

Similarly, the second sentence which utilizes the word "child", repeatedly and exclusively, and which contains a specific punishment of manslaughter, applies only to the extra-utero period. Violation by a physician of the first sentence of this Section is punishable by Sections 12 and 14 of the challenged legislation providing for revocation of medical license and conviction of a misdemeanor. The testimony of all witnesses indicated that all methods of abortion by definition and design are intended to produce the death of the fetus. Accordingly, the direct conflict between the first sentence of this Section and a woman's right to terminate a pregnancy is manifest.

In a related, recent case a federal three-judge panel enjoined an attempt by the Pennsylvania legislature to redefine viability in a manner imposing unwarranted and unconstitutional pre-natal burdens upon physicians. (*Planned Parenthood Association, Inc.*, et al. v. *Fitzpatrick*, et al. [E.D. Pa., No. 74-2440, filed and temporary injunction issued Sept. 20, 1974], *application for vacation of preliminary injunction denied*, sub nom. *Wohlgemuth*, et al. v. *Planned Parenthood of Southeastern Pennsylvania, Inc.*, et al., 42 L.Ed. 2d 797 [No. A-285, Jan. 13, 1975]).

Lastly, to adopt appellant's interpretation of Section 6(1) would create conflict and inconsistency as to the definition of the crime and its punishment with the pre-existing criminal, statutory scheme dealing with murder in the first degree (Mo.

R.S., Sections 559.010 and 559.030), murder in the second degree (Mo.R.S., Sections 559.020 and 559.030), manslaughter (Mo.R.S., Sections 559.070 and 559.140) and killing of an unborn quick child (Mo.R.S., Section 559.090).

III

The District Court Correctly and Properly Held the Entire Section 6(1) to Be Unconstitutional and the Various Sentences Thereof to Be Not Severable

The District Court correctly held both in its "Order, Judgment and Decree" of January 31, 1975, and its "Order" of February 12, 1975, that the three sentences comprising the challenged Section 6(1) were not severable one from the other.

The second sentence of Section 6(1) is inextricably tied in with the first sentence, inasmuch as it refers to *"the abortion"* and *"the child"*, an obvious reference to the preceding sentence. If this were not the case, the language utilized would undoubtedly be framed as *"an abortion"* and *"a child"*.

As stated in 16 *Am.Jur.* 2d, "Constitutional Law," Section 186, pp. 414-415,

> "If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the residue independently, and accordingly, the entire statute is invalid." . . .
>
> "[I]f the purpose of a statute is to accomplish a single object only and some of its provisions are unconstitutional and void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portions."

The challenged Section 6(1) has the singular purpose of attempting to set forth a comprehensive standard of care prescribed for physicians during an abortion, both pre-natally and post-natally. The Missouri legislature desired to enact an encompassing standard of care. It is beyond the area of concern as to whether the Missouri legislature would have enacted the remainder of Section 6(1) without the initial and primal sentence compromising approximately one-half (½) of the entire Section. They chose not to do so.

As cited with approval in *State* ex rel. *State Board of Mediation* v. *Pigg*, 244 S.W.2d 75 (Mo. 1951), at pp. 84-85,

> "The rule is stated in State ex rel. Transport Mfg. & Equipment Co. v. Bates, 359 Mo. 1002, 224 S.W.2d 996, 1001, as follows: 'It is generally true if the invalid provision of a statute and the residue thereof are wholly independent of each other, readily separable, and completely distinct; and if the residue is of itself complete, sensible and capable of being executed that the invalid provision will fall and the residue of the statute will stand. * * * The fact that the residue of an act remaining after a portion has been declared invalid may be complete in and of itself is not always sufficient to sustain it. If the invalid portion is so connected with the residue of the statute as to furnish the consideration for the enactment of the residue and as to warrant the belief that they were intended as a whole and that the Legislature would not have passed the part remaining had it known the other part would be held invalid, then the entire act must fall.' And see 50 Am. Jur. 354, Statutes, Sec. 353; 11 Am.Jur. 834, Const. Law, Secs. 152 and 155."

There can be little doubt that the various sentences of the challenged section were intended as a unified and interdependent whole.

CONCLUSION

For this Honorable Court to grant plenary review of an unanimous three-judge panel determination of the unconstitutionality of the challenged Section 6(1), which on its face directly conflicts with prior holding of this Honorable Court and an unanimous line of other federal court decisions or to grant plenary review as to the spurious issue of statutory severability is unwarranted. The issues attempted to be raised by appellant are so unsubstantial as not to need further argument nor judicial attention.

Respectfully submitted,

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

JUDITH MEARS
22 East 40th Street
New York City, New York
(212) 725-1222

Attorneys for Appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D.

Certificate of Service

I, the undersigned attorney for appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D., and a member of the bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule No. 33 I have caused to be served true and correct copies of the foregoing "Motion of Appellees, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D., to Affirm the Judment Sought to be Reviewed and Brief of Said Appellees in Support Thereof" upon each party required to be so served, by depositing said copies in a United States Postal Service mail box, with first class postage prepaid and affixed, addressed to The Honorable John C. Danforth, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri 65101 and to Mr. J. Brendan Ryan, Circuit Attorney of the City of St. Louis, 1320 Market Street, St. Louis, Missouri 63103.

FRANK SUSMAN
SUSMAN, SCHERMER, WILLER & RIMMEL
7733 Forsyth Boulevard—Suite 1100
St. Louis, Missouri 63105
(314) 725-7300

see

74

1151